ployee welfare benefit" plans. 29 U.S.C. §1002(1). The full scope of the statute has evolved as courts have determined whether certain employer-employee arrangements were covered by ERISA.

Of particular and obvious significance to this appeal is the issue of severance pay. Until 1985, it was unsettled in this Circuit whether a severance pay provision was a mere "payroll practice" outside the operation of ERISA or a "welfare benefit" plan covered by the statute. The question was clearly answered, however, in Holland, where we held that ERISA preemption did apply to disputes over severance pay. We further concluded that severance benefits could be denied if the failure to pay was not "arbitrary and capricious." 772 F.2d at 1148.

In light of Holland, there is no question but that if the claims of the former Warner-Lambert employees had arisen initially in the present litigation, they would have been subject to ERISA. The district court concluded, however, that in this instance an essentially equitable

doctrine of judicial procedure precluded the application of the federal statute. We disagree.

The law of the case doctrine is not an "inexorable command" but rather a prudent judicial response to the public policy favoring an end to litigation. White v. Murtha, 377 F.2d 428 (5th Cir. 1967).[4] Clearly, courts could not perform their duties "satisfactorily and efficiently . . . if a question once considered and decided . . . were to be litigated anew in the same case upon any and every subsequent appeal." Great Western Tel. Co. v. Burnham, 162 U.S. 339, 344 (1896). Accordingly, when a decision of an appellate court establishes "the law of the case," it "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal . . . unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3)

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[4] In Arizona v. California, 460 U.S. 605, 618 (1983), the Supreme Court observed that "law of the case is an amorphous concept . . . [that] directs a court's discretion, . . . [but] does not limit the tribunal's power."

the prior decision was clearly erroneous and would work manifest injustice." EEOC v. International Longshoremen's Assoc., 623 F.2d 1054 (5th Cir. 1980). Although the doctrine applies both to questions actually decided as well as to those decided by "necessary implication," it does not reach "questions which might have been decided but were not." Copra, Inc. v. Ward Foods, Inc., 567 f.2d 1316 (5th Cir. 1978).

We find but scant indication that any determination on the scope of ERISA was ever made in the Livernois litigation.[5] Certainly, as a totally separate and distinct issue, a ruling on ERISA was neither directly nor implicitly required in order for this Court to resolve the purely contractual issues raised in 1983.[6]

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[5] There is admittedly a brief reference to ERISA at Livernois, 723 F.2d 1152-53 n.6. That statement, however, merely expressed the mistaken assumption, later corrected in Holland, that ERISA did not apply to severance benefits.

[6] Appellees have repeatedly suggested in this appeal that they "won" the 1982-83 litigation. That is an overly-expansive view. If winning is defined as attaining a stated objective, then the Livernois plaintiffs certainly did not win, for they did not receive the severance benefits that they sought. Rather, this Court

Moreover, we cannot accept appellees' suggestion that Warner-Lambert's failure to assert federal preemption in the earlier case renders that default part of the law of the case. An omission may become part of the law of the case only if its subsequent assertion is an attempt to relitigate the ultimate issue previously decided. The ultimate, indeed the only issue, in Livernois, however, was contract. See Holland, 772 F.2d 1148 n.6. Appellant's present claim of preemption does not challenge this Court's previous analysis. Rather, appellant contends only that the rights of the plaintiffs must now be weighed in light of a hitherto unexamined legal doctrine.[7]

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held only that plaintiffs retained rights under their contractual arrangement with their former employer which might ripen into an enforceable claim. The possibility that some other unforeseen operation of law might bar the contractual claim was not addressed.

[7] Appellees' reliance upon cases such as Zdanok v. Glidden Company, 327 F.2d 944 (2d Cir. 1964), and Sorensen v. Pyrate, 65 F.2d 982 (9th Cir. 1933), is misplaced and illustrates their failure to appreciate this essential distinction in the law of the case doctrine. In Zdanok, the doctrine was invoked to prevent a defendant from

Even were we to assume for purposes of this appeal that Warner-Lambert's failure to assert ERISA in Livernois could be brought under the general rubric of law of the case, it would nevertheless be error to refuse to apply the statute in the present litigation. A judicially created procedural doctrine cannot defeat the intent of Congress. When Congress preempts state law, it gives concrete expression to the constitutional authority granted by the Supremacy Clause of Article VI. Louisiana Public Service Comm'n v. FCC, 106 S.Ct. 1890 (1986). The effect of a preemptive statute is, therefore, quasi-jurisdictional. A state court confronted with a dispute governed by a preemptive federal statute would have no authority to adjudicate the matter

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reopening on the basis of new evidence its liability for breach of contract after a remand for a determination of damages. Similarly, in Sorensen, a defendant who had relied unsuccessfully upon an interpretation of contract language defense was not permitted on remand to contest its liability for breach of contract on the new theories of deceit, nonexistence of subject matter and lack of mutuality. In this case, appellant's claim of preemption may be determined without disturbing the Livernois assessment of contract rights. Both Zdanok and Sorensen are therefore inapposite.

other than in accordance with the statute. Kalb v Feuerstein, 308 U.S. 433, 440 (1940). Certainly, a federal district court sitting pursuant to diversity jurisdiction has no greater authority.

We conclude, therefore, that it was error for the district court to refuse to apply the standards provided in ERISA when weighing the claims of the former Warner-Lambert employees to severance pay. It does not follow, however, that our decision in Livernois has been overruled or has no relevance to the reexamination of appellees' claims on remand. In determining whether Warner-Lambert's present refusal to pay benefits is arbitrary or capricious, the district court should consider the totality of the circumstances, including the nature of the original contractual relationship between appellant and appellees. The district court should also weigh the implication of Warner-Lambert's apparent acquiescence in the result reached in Livernois.[8]

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[8] In Hudson Transit Lines v. United States ICC, 765 F.2d 320 (2nd Cir. 1985), the court held that an employer who had failed to comply with ERISA reporting and disclosure requirements could not be estopped from asserting federal preemp-

We, of course, express no view with regard to the ultimate disposition of this matter. We are not convinced, however, that Warner-Lambert must automatically prevail simply because the claims against it must now satisfy the standards established in ERISA.

III.

For the foregoing reasons, the judgement of the district court is reversed and this matter is remanded for additional proceedings consistent with this opinion.

REVERSED AND REMANDED

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tion. The court held, however, that it was proper to consider whether the employer;s conduct had "tainted" the subsequent refusal to pay benefits, thereby rendering the refusal arbitrary and capricious. 765 F.2d 328-29. A similar consideration of Warner-Lambert's prior conduct would certainly be appropriate.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF SOUTH CAROLINA

GREENWOOD DIVISION

Virginia M. Sejman, et al., Plaintiffs, vs. Warner-Lambert Company, Inc., Defendant.	)	C/A 9:85-1146-17
	)	O R D E R
Thomas H. Givens, et al., Plaintiffs, vs. Warner-Lambert Company, Inc. Defendant.	)	C/A 9:85-1698-17

These cases are before the Court upon motion of the defendant, Warner Lambert Company, Inc., (Warner Lambert) for summary judgment pursuant to Rule 56(b), Fed. R. Civ. P. Plaintiffs in both cases seek to recover severance pay from Warner Lambert. In an order entered on February 5, 1987, this court denied Warner Lambert's motion for summary judgment and determined that the Employee Income Security Act of

1974, 29 U.S.C. § 1001 et seq. (ERISA), would have no application to these actions, by reason of the failure of the defendant to plead ERISA in an earlier action involving some, but not all, of the parties to these actions. See Livernois v. Warner-Lambert Co., Inc., 723 F.2d 1148 (4th Cir. 1983). The court determined that its decision regarding the applicability of ERISA involved a controlling question of law as to which there was substantial ground for disagreement and permitted the parties to seek review of its decision pursuant to 28 U.S.C. § 1292(b). The United States Court of Appeals for the Fourth Circuit accepted the appeal. In a decision announced on April 18, 1988, the court of appeals reversed this court, determined that ERISA does apply to these actions, and remanded the case for further proceedings consistent with the opinion. Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66 (4th Cir. 1988).

On remand, defendant has renewed its motion for summary judgment. Oral argument was heard on the motion on June 10, 1988. For the

reasons set forth below, the motion is granted.

Prior to January 20, 1982, all of the plaintiffs were employed by Warner Lambert in its Medical-Surgical Division in Greenwood, South Carolina (Cmptl. ¶ IV). On January 20, 1982, the Medical-Surgical Division was sold as a going concern to Professional Medical Products, Inc. (PMP). (Affidavit of Raymond M. Fino, sworn to May 10, 1988 ¶6). Following the sale, each of the plaintiff continued to work for PMP in the same jobs, at the same location, with the same seniority, at the same or higher salaries, and with fully comparable employee benefits (Deposition of C. Birge Sigety at 5).

The Sejman Plaintiffs: Except for plaintiff Glenda Idle who voluntarily retired from PMP after February 1, 1985, all of the Sejman plaintiffs have remained employed by PMP from the date of the sale up to the present time (Response to Request to Admit ¶ ¶ 17-18. During the course of their employment at PMP, PMP has made occasional changes in the configuration of its employee benefits package, sometimes enhancing various of

the benefits available and other times making certain cutbacks (Deposition of J. Lee Foltz at 30-31). Among other changes made over the years, PMP instituted a revised severance policy effective February 1, 1985 (Cmplt. ¶ XII). Overall, however, the level of employee benefits in place at PMP is still essentially comparable to that existing as of January 20, 1982 (Foltz Dep. at 30-31).

The Sejman plaintiffs contend that, effective February 1, 1985, they experienced "job elimination" within the meaning of the Warner Lambert severance policy, even though they continued to work for PMP in the same jobs following that date. They assert that the job elimination occurred automatically as a result of PMP's change of certain employee benefits, most notably the PMP severance pay policy. The Sejman plaintiffs seek an aggregate recovery of more than four hundred thousand and no/100 ($400,000.00) Dollars in severance benefits.

The Givens Plaintiffs: Each of the Givens plaintiffs was employed by PMP for more

than three (3) years after Warner Lambert's sale of the Medical-Surgical Division (Deposition of Thomas H. Givens at 4-5; Deposition of M. L. Brannon at 4-5; Deposition of John J. Caputo at 3-4; Deposition of Clayton E. Robinson, Jr. at 3). On March 8, 1985, plaintiffs John J. Caputo and Clayton E. Robinson were terminated by PMP purportedly for unsatisfactory work performance (Caputo Dep. at 29; Robins Dep. at 3, 6-7), and on April 19, 1985, plaintiffs Thomas H. Givens and M. L. Brannon were terminated by PMP due to alleged job elimination (Givens Dep. at 5-6; Brannon Dep. at 7).

Givens and Brannon received fifteen thousand five hundred seventy four and no/100 ($15,574.00) dollars and ten thousand eight hundred sixty eight and no/100 ($10,868.00) dollars, respectively, in severance pay from PMP in accordance with the severance policy then in effect at PMP (Cmplt. ¶ IX). Caputo and Robinson received no payment specifically denominated as severance pay from PMP, but in exchange for releases of "any and all claims for relief or

damages, arising out of or having any bearing whatsoever on the terms and conditions of [their] employment with Professional Medical Products, Inc., or [their] termination from Professional Medical Products, Inc.", they received payment of thirty thousand and no/100 ($30,000.00) Dollars and twenty five thousand and n0/100 ($25,000.00) dollars, respectively (Caputo Dep. at 8-8).

In accordance with the decision in Sejman, the standards provided in ERISA must be applied in weighing the claims of these former Warner Lambert employees to severance pay.

Judicial review of a denial of benefits under a plan covered by ERISA is narrowly limited to a determination whether the denial was arbitrary and capricious. Whipp v. Seafarers Vacation Plan, 832 F.2d 853, 857 (4th Cir. 1987); Holland v. Burlington Indus., 772 F.2d 1140, 1148-49 (4th Cir. 1985), cert. denied, 477 U.S. 903, aff'd mem. sub. nom., Brooks v. Burlington Indus., 477 U.S. 901 (1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); LeFebre v. Westinghouse Elec. Corp., 747

F.2d 197, 204 (4th Cir. 1984). Where eligibility for benefits is at issue, primary responsibility for decision-making must rest with those who formulate and administer company policies and "whose experience is daily and continual, not with judges whose exposure is episodic and occasional." Berry, 761 F.2d at 1006; Holland, 772 F.2d at 1148.

Under the applicable arbitrary and capricious standard of review, the sole question is whether the decision reached "was made rationally and in good faith -- not whether it was right." Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir. 1977). It is not the court's task to substitute its judgment for that of the administrator or to determine whether the administrator made the best possible decision. Whipp, 832 F.2d at 856.

In reviewing a denial of severance benefits, courts have focused on four factors in determining whether the denial was arbitrary and capricious: (1) whether the challenged interpretation of the plan is fair and reasonable in

the context of the entire plan; (2) whether the challenged interpretation has been uniformly applied in similar situations; (3) whether the award of severance benefits would result in a windfall recover; and (4) whether the procedural requirements of ERISA have been so consistently and flagrantly violated that a substantive harm has been worked on the plan participants. E.g., Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623 (6th Cir. 1987); Holland, supra; Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir.), cert. denied, 474 U.S. 995 (1985); Jung v. FMC Corp., 755 F.2d 708 (9th.Cir. 1985); Sly v. P. R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983).

1. Fair and Reasonable Interpretation

Under the plain language of the Warner Lambert severance policy, eligibility for severance benefits depends upon two factors. First, the claimant must be a covered "employee," of Warner Lambert (Fino. Aff., Ex. B). Second, the claimant must have been "terminated by the

Company as a result of job elimination, work performance, or other reasons of Company convenience" in a circumstance not connected with a divestiture. (Fino Aff., Ex. B).

Plaintiffs' ineligibility for severance pay under the Warner Lambert severance policy is thus clear. First, in 1985 when their entitlement to severance pay allegedly arose, they were not employees of Warner Lambert and had not been employees of Warner Lambert for more than three (3) years. To the contrary, they were employees of PMP and were covered by the severance policy in effect at PMP.

Moreover, none of the plaintiffs were "terminated" by Warner Lambert "as a result of job elimination, work performance or other reasons of Company convenience." (Id.) There is no dispute that the terminations of the Givens plaintiffs were carried out by PMP without any involvement, or right of involvement, on the part of Warner-Lambert. Equally undisputed is the fact that none of the Sejman plaintiffs were "terminated" by anyone, much less Warner Lambert.

Each and every one of them continued to work at PMP on and after February 1, 1985 just as he or she had done for the past three years (Response to Request to Admit __ 17-18).

Warner Lambert's interpretation of its severance policy as denying benefits to individuals who do not satisfy either of the eligibility requirements unambiguously set forth in the severance policy is clearly fair and reasonable.

2. Consistent Past Practice

Neither the present Warner Lambert severance policy nor any of its predecessor has ever been interpreted or applied by Warner Lambert so as to afford benefits to individuals who were not employees of Warner Lambert or a corporate affiliate on the date of the event claimed to trigger entitlement to severance pay (Fino Aff. ¶ 5). In connection with more than fifty-five (55) divestitures over the course of more than thirty (30) years, Warner Lambert has never paid severance benefits to individuals who had the opportunity to continue working with the acquir-

ing company, even if those individuals were ultimately terminated by the acquiring company or encountered a reduction in fringe benefits after their employment with Warner-Lambert ceased (Fino Aff. ¶ ¶ 4-5).

Conformity with a uniform past practice of not paying severance benefits under comparable circumstances is accepted as an indication of the absence of arbitrary and capricious conduct. E.g., Schwartz v. Newsweek, Inc., 827 F.2d 879, 883 n.3 (2d Cir. 1987); Anderson, 759 F.2d at 1522; Jung, 755 F.2d at 713; Sly, 712 F.2d at 1213.

3. Windfall Recovery

In reviewing the denial of severance benefits under the arbitrary and capricious standard, courts have sustained interpretations which avoid windfall payments. E.g., Acton v. Tosco Corp., 815 F.2d 1161, 1163 (8th Cir. 1986); Jung, 755 F.2d at 714; Sly, 712 F.2d at 1211; Pabst Brewing Co. v. Anger, 610 F. Supp. 214, 217 (D. Minn. 1985), aff'd., 784 F.2d 338 (8th Cir. 1986). The plaintiffs, who are covered by their

current employer's severance policy, seek to recover supplemental severance benefits from a prior employer. Recovery of such benefits can fairly be described as a windfall.

4. Procedural Requirements

Since Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985), was decided, one of the factors considered in connection with judicial review of a denial of severance benefits is the failure to follow procedural requirements under ERISA.

In remanding this case, the Fourth Circuit Court of Appeals directed this court's attention to the question of whether the employer's failure to comply with ERISA reporting and disclosure requirements might "taint" the subsequent refusal to pay benefits, thereby rendering the refusal arbitrary and capricious. Sejman, 845 F.2d at 70, n. 8. It is this factor to which plaintiffs have devoted most of their attention on remand, setting forth certain procedural violations of ERISA. Memorandum of Plaintiffs in Opposition to Summary Judgment at

3-4.

In Blau, the Ninth Circuit reversed the lower court's grant of summary judgment in favor of Del Monte and held that Del Monte's "wholesale" and "flagrant" failure to comply with ERISA's reporting and disclosure requirements precluded a finding, as a matter of law, that its denial of severance benefits following the divestiture of a wholly owned subsidiary was not arbitrary and capricious. Blau, 748 F.2d at 2353.

In the years since Blau was decided, the case has repeatedly been distinguished by courts dealing with the same question of procedural non-compliance with ERISA, including the Ninth Circuit in a decision rendered just a week later, Jung, 755 F.2d at 714-15, and the Fourth Circuit in Holland, 772 F.2d at 1149-50. Indeed, since Blau, summary judgment has frequently been awarded in severance pay litigation in spite of a failure to have satisfied the procedural requirements of ERISA. E.g., Simmons, 844 F.2d at 524; Coleman v. General Elec. Co., 643 F.

Supp. 1229, 1241-42 (E.D. Tenn. 1986), aff'd., 822 F.2d 59 (6th Cir. 1987); DeAngelis v. Warner Lambert Co., 641 F. Supp. 467, 473 (S.D.N.Y. 1986); Acquin v. Bendix Corp., 637 F. Supp. 657, 664-65 (E.D. Mich. 1986); Pabst Brewing Co., 610 F. Supp. at 216. Unless the procedural dereliction is so egregious as to work a substantive harm, non-compliance with ERISA's procedural requirements does not render otherwise reasonable decisions arbitrary and capricious. See Gilbert v. Burlington Indus., 765 F.2d 320, (2d Cir. 1985), aff'd mem. sub nom., Roberts v. Burlington Indus., 477 U.S. 901 (1986).

The Blau case turned on the existence of a "wholesale and flagrant" "flout[ing]" of the procedural requirements of ERISA, evidence that the severance policy had been "actively concealed" from employees, and suggestions that the policy had been discriminatorily enforced such that senior executives fared better than lower level salaried workers. Plaintiffs have not and could not argue that these factors are present here. To the contrary, at his deposition,

Raymond F. Fino, Warner Lambert's Vice President, Human Resources, explained:

> All of our policies are disseminated via something that we call the policy manual. That is in the possession of all employees that supervise other employees. To that extent, the [severance] policy was disseminated. In addition, if any employees ask for a copy, they would be given a copy.
>
> * * *
>
> All employees are aware of the existence of the policy manual. They are encouraged to have discussions with their line supervisors, and beyond that, I would simply have to say that it's common knowledge by virtually all exempt employees of Warner Lambert that there is a severance policy. My years of experience would tell me most of the employees would have that knowledge.

(Fino Dep. at 12, 14). Consistent with Fino's testimony, plaintiff Givens stated in his deposition that Warner Lambert's severance policy was "well circulated" to employees, including himself, and that he was aware of the plan's existence, had a copy of the plan, and knew to whom any inquiries could be addressed from the time he first started working at Warner Lambert (Givens Dep. at 42-44). Similarly, plaintiff Robinson knew of Warner Lambert's severance policy, was familiar with its terms, and had a copy of the plan from the time he joined the company (Robi-

nson Dep. at 26-28). Finally, plaintiff Caputo had a copy of the severance policy "for years" and discussed it with personnel people in various capacities at Warner Lambert (Caputo Dep. at 43-44). Indeed, in view of the prior litigation over severance pay in Livernois, it is scarcely possible that employees of the Medical-Surgical Division could have been unaware of Warner Lambert's severance policy.

Whatever procedural violations with respect to ERISA may have occurred here do not approach the level of those in Blau, nor are they of the type envisioned by the Fourth Circuit in Sejman as potentially "tainting" the decision to deny benefits. The violations clearly worked no substantive harm on plaintiffs, and provide no basis for finding that it was arbitrary and capricious for Warner Lambert to have denied severance benefits in accordance with the language of its policy and unbroken past practice.

5. The Totality of the Circumstances

In addition to the foregoing traditional analysis under the arbitrary and capricious

standard, this court must undertake an additional analysis, made necessary by reason of the unique procedural history of this case. In the Livernois decision, the Fourth Circuit (applying state contract law because ERISA was not raised by the defendant in that action) fashioned a reasonable method for resolving the dispute that had not been directly advocated by either party. That is to say, the court held that Warner Lambert did bear a continuing contractual obligation toward its former employees, which would not ripen into an obligation to pay unless and until the successor employer directly or indirectly terminated their employment. In Sejman the Fourth Circuit directed that, on remand, this court should consider "the totality of the circumstances, including the nature of the original contractual relationship between appellant and appellees. . . [and] the implication of Warner Lambert's apparent acquiescence in the result reached in Livernois." Sejman, 845 F.2d at 70.

On remand, plaintiffs have not offered any significant reason why Warner Lambert's

"apparent acquiescence" in the outcome of Livernois should militate in favor of a finding that the ultimate decision on severance pay was arbitrary and capricious.

Warner Lambert points out that it has never acquiesced in an interpretation of its policy that affords benefits to individuals such as the plaintiffs in these cases. Shortly after the district court's unfavorable decision in the Livernois case, Warner Lambert amended its 1981 policy on severance pay to make it clear that severance benefits would not be available to an employee whose employment with Warner Lambert was terminated in connection with a divestiture if he or she had the opportunity to continued [sic] to work with the acquiring company. Moreover, as the "prevailing party" in the Livernois appeal, Warner Lambert had no occasion to challenge the route by which the Fourth Circuit reached the conclusion that the plaintiffs were not entitled to the severance benefits they sought.

Indeed, the Fourth Circuit's opinion in Livernois indicates that Warner Lambert's "a-

cquiescence" was lukewarm at best:

> The fact that, when the alternative approach was broached at oral argument, counsel for Warner Lambert indicated that it was something he was sure his client would find acceptable cannot be regarded as un unrestrained endorsement. Rather the handwriting was on the wall to the effect that the panel of the Court hearing the case had serious misgivings about the Warner Lambert "solution". Counsel was expressing a preference for half a loaf rather than none.

Livernois, 723 F.2d at 1155, n. 11.

In sum, Warner Lambert's acquiescence, such as it was, in the Livernois result, does not alter the result called for under the traditional arbitrary and capricious analysis set out above. This factor, considered in conjunction with all of the other circumstances present in this controversy, does not result in a finding that the decision to deny severance benefits to the plaintiffs was arbitrary and capricious.

For the foregoing reasons, it is hereby ORDERED that the motion of the defendant, Warner Lambert Co., Inc. for a summary judgment be, and the same hereby is, granted, and that this action is dismissed.

IT IS SO ORDERED.

Joe F. Anderson, Jr.
United States District Judge

Greenville, South Carolina

July 25, 1988

Supreme Court, U.S.
FILED
JUL 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA M. SEJMAN, A. R. TRAUTWEIN, THOMAS J. MCHUGH, JR., GLENDA IDLE, ROY G. COOK, JOSEPH D. DUBUQUE, ROBERT C. REESE, JOE L. NORMAN, MORRIS LEISTER, MARY J. MILLER, RAYMOND G. BERNHARDT, and LEWIS LATHREN,

Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

THOMAS H. GIVENS, M. L. BRANNON, JOHN J. CAPUTO, and C.E. ROBINSON, JR.,

Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly sustained Warner-Lambert Company's denial of severance pay, in accordance with the language and purpose of its severance policy and consistent with uniform past practice, to individuals who had last been employed by Warner-Lambert more than three years earlier, who based their claims to severance pay upon actions taken by their new employer without Warner-Lambert's knowledge or participation, and most of whom had not even lost their jobs.

2. Whether the court of appeals was correct to reject the petitioners' claim of a vested, contractual right to severance pay purportedly established by a 1983 case decided under South Carolina common law, in light of the contingent and unaccrued nature of severance benefits under the Employee Retirement Income Security Act ("ERISA") and in view of ERISA's sweeping preemption provision.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.[1]

1 Warner-Lambert's list of parent companies and subsidiaries (except wholly owned subsidiaries), required by Rule 29.1 of this Court, has already been filed with the Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1566

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Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

THOMAS H. GIVENS, M. L. BRANNON, JOHN J. CAPUTO, and C. E. ROBINSON, JR.,

Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent Warner-Lambert Company opposes granting the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered in these cases on November 24, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 889 F.2d 1346 (4th Cir. 1989). The Order of the District Court for the District of South Carolina granting summary judgment in favor of Warner-Lambert is unreported. An earlier opinion of the Court of Appeals for the Fourth Circuit in these cases is reported at 845 F.2d 66 (4th Cir. 1988).

JURISDICTION

Discretionary jurisdiction to review the judgment of the Court of Appeals for the Fourth Circuit, entered on November 24, 1989, rests on 28 U.S.C. § 1254(1). A petition for rehearing and a suggestion for rehearing *en banc* were denied on January 5, 1990. Warner-Lambert's time to submit its brief in opposition to the petition for a writ of certiorari was extended to July 5, 1990.

STATUTE INVOLVED

This case involves the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* Of particular relevance are its provisions exempting employee welfare benefit plans, such as severance benefit plans, from the statute's stringent accrual, vesting, and funding requirements, 29 U.S.C. §§ 1051, 1081, and providing for broad preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

STATEMENT OF THE CASE

In these cases, sixteen individuals, who have not been employed by Warner-Lambert since January 1982 and most of whom have not even lost their jobs, seek to recover hundreds of thousands of dollars of severance benefits from Warner-Lambert because of actions taken by their new

employer. The court of appeals rejected the petitioners' claims that they had a vested, continuing right to severance pay from Warner-Lambert and found that they must instead look to their new employer for any severance benefits.

A. Factual Background

On January 20, 1982, Warner-Lambert sold its Medical-Surgical Division as a going concern to Professional Medical Products, Inc. ("PMP"). Following the sale to PMP, the employees in the Medical-Surgical Division, including the petitioners here, continued to work without interruption in the same jobs, at the same location, with the same seniority, at the same or higher salary, and with fully comparable employee benefits.

Notwithstanding that there had been no interruption in their employment, eleven employees of the Medical-Surgical Division, including six of the sixteen petitioners here, brought suit against Warner-Lambert, claiming a right to severance pay as a result of the sale. Relying exclusively on a breach of contract theory, they alleged that, even though they continued to work in the same jobs, they had been terminated as a result of job elimination by virtue of the sale and thus were entitled to severance pay under Warner-Lambert's 1981 severance policy.[2]

Following a trial, the district court found in favor of the plaintiffs and made severance pay awards to them ranging from a low of $23,796.40 to a high of $58,625.98. On appeal, the Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit, exercising diversity jurisdiction, held, as a matter of South Carolina common law, that the plaintiffs had not been terminated by reason of job elimination within the meaning of the Warner-Lambert severance policy and dis-

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2 Warner-Lambert's 1981 severance policy provided in relevant part:

> Purpose: To assure fair treatment to an employee terminated by the Company as a result of job elimination, work performance or other reasons of Company convenience except for violation of company rules or regulations . . . .

missed their claims as premature. *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148, 1156-57 (4th Cir. 1983). The court of appeals went on to interpret Warner-Lambert's severance policy as implicitly imposing on Warner-Lambert future liability for severance payments in the event that PMP terminated an employee for other than just cause and failed to satisfy the severance pay obligation. *Livernois*, 723 F.2d at 1157.

The petitioners in the Givens case worked for PMP for more than three years following the divestiture. In 1985, each of the four of them was terminated by PMP and allegedly received less severance pay from PMP than they would have been entitled to under Warner-Lambert's 1981 severance policy. Notwithstanding that the Givens petitioners had not worked for Warner-Lambert for more than three years when they were let go by PMP and that Warner-Lambert had no role in or control over their terminations, they claim entitlement to a total of almost $200,000 in additional severance benefits from Warner-Lambert.

The petitioners in *Sejman*, on the other hand, have not, to this day, been terminated by PMP. All of them have remained employed by PMP from the date of the sale up to the present time, with the single exception of petitioner Glenda Idle who voluntarily retired from PMP during 1985 and is receiving retirement benefits. In an apparent effort to supplement their ongoing salary or retirement payments from PMP with severance payments from Warner-Lambert, the Sejman petitioners contend that, effective February 1, 1985, when PMP revised its severance policy to provide reduced benefits in certain circumstances, they experienced job elimination within the meaning of the Warner-Lambert severance policy. They claim entitlement to more than $400,000 in severance benefits. Indeed, even petitioner Idle, who completed her working life at PMP and is now in voluntary retirement, maintains that she is owed $53,227 in severance benefits by Warner-Lambert.

B. Prior Proceedings

In mid-1985, the Givens and Sejman petitioners commenced actions in the United States District Court for the District of South Carolina to recover severance benefits allegedly due to them under Warner-Lambert's severance policy. Their claims were asserted under both the South Carolina common law of contracts and ERISA. The petitioners based their claims of entitlement to severance pay upon the Fourth Circuit's decision in *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148 (4th Cir. 1983).

Following the completion of discovery, Warner-Lambert moved for summary judgment in both cases on the grounds that the common law breach of contract claims had been preempted by ERISA and that Warner-Lambert's denial of severance benefits was neither arbitrary nor capricious as a matter of law and thus could not support a claim under ERISA. The district court denied the motions in an Order dated February 5, 1987.

Although the district court recognized that "The scope of ERISA is unquestionably broad and generally it would preempt breach of contract claims founded upon state law principles," it nonetheless held that the petitioners' breach of contract claims were not preempted by ERISA and that the cases would be governed by the Fourth Circuit's decision in *Livernois*. The district court reasoned that "The law of the case doctrine dictates that Warner-Lambert be bound by the *Livernois* solution." In light of that holding, the district court did not reach Warner-Lambert's arguments under ERISA.

On appeal, the Fourth Circuit rejected *Livernois* as the determinative authority in the cases and held instead that the standards provided in ERISA were preemptive and should be applied in weighing the petitioners' claims to severance pay. *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 70 (4th Cir. 1988) ("*Sejman I*"). Consequently, the matter was remanded to the district court for a determination whether, considering "the totality of the circumstances," Warner-Lambert's denial

of severance benefits was "arbitrary or capricious." *Sejman I*, 845 F.2d at 70.

On remand, the district court granted Warner-Lambert's renewed motion for summary judgment, finding that its denial of severance benefits to the petitioners was not arbitrary or capricious. In reaching that conclusion, the district court focused, in particular, on the petitioners' "clear" ineligibility for severance benefits under the "plain language" of Warner-Lambert's severance policy; Warner-Lambert's adherence to its consistent past practice in connection with more than fifty-five divestitures over the course of thirty years; and the "windfall" nature of the recovery which the petitioners were seeking to obtain.

The Fourth Circuit affirmed the judgment of the district court that the petitioners had no entitlement to severance benefits from Warner-Lambert.[3] *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346 (4th Cir. 1989) ("*Sejman II*"). Acknowledging at the outset that this Court's intervening decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), required review of Warner-Lambert's denial of severance pay under the *de novo* standard rather than the arbitrary and capricious standard, the court of appeals found it "clear that Warner-Lambert's action was justifiable under the *de novo* standard." *Sejman II*, 889 F.2d at 1348.

Relying on the contingent and unaccrued nature of severance benefits under ERISA, the Fourth Circuit rejected the petitioners' claims that *Livernois*, 723 F.2d 1148, gave them a vested contract right to severance pay from Warner-Lambert. *Sejman II*, 889 F.2d at 1348-49. The court of appeals then proceeded to review the language and purpose of Warner-Lambert's severance policy, its past practice under the severance policy, and the "windfall recovery" which would result from a finding for the petitioners, all of which led to the conclusion that the petitioners were not entitled to severance

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3 The affirmance was unanimous with respect to the Sejman petitioners, but there was a dissent with respect to the Givens petitioners.

benefits from Warner-Lambert. *Sejman II*, 889 F.2d at 1349-50.

In conclusion, the Fourth Circuit stated:

> To hold Warner-Lambert liable in this case would do violence both to Supreme Court and circuit precedent. It would be inconsistent with the character of severance pay plans as described by this circuit in *Sutton* [v. *Weirton Steel*], 724 F.2d at 410, with the principles of federal preemption of state contract law under ERISA as enunciated by the Supreme Court, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), *see also Shaw v. Delta Air Lines*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), and with the controlling effect accorded ERISA by *Sejman* in this very case. These principles point to one conclusion. Most plaintiffs here have or will recover severance pay at an appropriate time, but it is to the policy of their present employer that they must look.

Sejman II, 889 F.2d at 1350. A petition for rehearing and a suggestion for rehearing *en banc* were denied on January 5, 1990.

REASONS FOR DENYING THE WRIT

I

THE UNIQUE BACKGROUND OF THE CASES MAKES REVIEW UNWARRANTED

As the Fourth Circuit noted, "this litigation has pursued a long and tortuous course" which "began when the governing principles of federal preemption and benefit plan administration were less clear than they are today." *Sejman II*, 889 F.2d at 1350. Due to their anomalous background, the cases have no significance except to the parties and will affect no other present or future litigants.

No other employees will be in a position to look to *Livernois*, 723 F.2d 1148, as a potential source of rights and no

other employers will face the *Livernois* decision as an historic fact to be dealt with in their severance plan administration under ERISA. This Court should not squander its discretionary jurisdiction on cases, such as these, which lack either widespread impact or national importance.

II

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS

In the past decade, most of the courts of appeals have had occasion to consider the availability of severance pay under ERISA in the context of a sale of a division as a going concern. Irrespective of which circuit these cases proceeded in, their outcome was determined by reference to a uniform set of considerations, including the language and purpose of the particular severance policy at issue and the existence and effect of any noncompliance with the procedural requirements of ERISA by the particular employer involved.

The decisions rendered varied from case to case depending on how the several factors weighed in each individual case, but the legal analysis was consistent. *Compare Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987), and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) (refusing to uphold a denial of severance benefits following a divestiture) *with Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988); *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2d Cir. 1987); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987); *Holland v. Burlington Indus.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Indus.*, 477 U.S. 901 (1986) and *cert. denied*, 477 U.S. 903 (1986): *Anderson v. Ciba-Geiby Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); and *Sly v. P.R. Mallory & Co.*,

712 F.2d 1209 (7th Cir. 1983) (upholding a denial of severance benefits following a divestiture).

The petitioners confuse differences in result due to factual disparities with a true conflict between the courts of appeals. Admittedly, the Eleventh Circuit in *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, reached a different conclusion about the propriety of a denial of severance benefits following a divestiture than the Fourth Circuit did in these cases, but both courts considered the same factors in making their determinations. In both cases, the court of appeals considered the language and intent of the severance policy, past practice under the plan, and the seriousness of violations of ERISA's procedural requirements. Each case turned on its unique facts. There is no single, invariable interpretation which must be given to severance policies in every case. The so-called conflict in the circuits cited by the petitioners is thus adequately explained by the truism that different facts may well yield different results.

III

THE COURT OF APPEALS PROPERLY APPLIED ERISA STANDARDS IN WEIGHING THE CLAIM FOR SEVERANCE PAY

In arguing that the Fourth Circuit misused ERISA to deprive them of "vested contract rights" promised to them in *Livernois*, 723 F.2d 1148, the petitioners overlook the contingent nature of severance benefits under ERISA and ignore the existence of ERISA's sweeping preemption provision.

1. Contingent Nature of Severance Benefits

Under ERISA, employee welfare benefits, such as severance pay, are contingent, unaccrued, and unfunded benefits which can be unilaterally amended or even eliminated by an employer at any time. *See* 29 U.S.C. §§ 1051, 1081. Consequently, employees have no vested right to these benefits, and employers have no continuing duty to provide them. Con-

gress expressly exempted such benefits from the stringent vesting requirements applicable to retirement and pension benefits because it believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans . . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935 (1975).

The Fourth Circuit thus acted in accordance with the governing policies of ERISA in rejecting the petitioners' claim that they acquired "vested contract rights" to severance pay which survived their separation from Warner-Lambert. *Sejman II*, 889 F.2d at 1348-49. To have held otherwise would have thwarted Congress' intent of exempting employee welfare benefit plans from vesting requirements and from the attendant administrative burden and expense. If the petitioners' argument had been accepted, companies would be faced, after the sale of a division or subsidiary, with the impossible burden of monitoring the future careers of all their former employees in order to determine when and why they might eventually leave the successor employer. The court of appeals found that:

> Requiring such an ongoing obligation for severance payments after employees are employed elsewhere could discourage employers like Warner-Lambert from seeking to ensure that their former employees retain their old positions or encourage such employers to forego severance payments altogether.

Sejman II, 889 F.2d at 1349. *Cf. Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, 13 (1987) ("Faced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all.")

2. Preemption

The sweeping preemption provided for in ERISA of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" expressly includes preemption

of "all laws, *decisions*, rules, regulations, or other State actions having the effect of law, of any State. 29 U.S.C. § 1144 (emphasis added). Decisional law, such as *Livernois*, 723 F.2d 1148, which purports to regulate the payment of severance benefits under State common law principles, has thus been preempted by ERISA and cannot serve as the basis for resolution of a dispute over entitlement to benefits. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 n.1 (1987).

In refusing to recognize *Livernois* as the determinative authority which the petitioners urged it should be in deciding their entitlement to severance pay from Warner-Lambert, the Fourth Circuit gave proper effect to the preemption provision of ERISA. *Sejman II*, 889 F.2d at 1350.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: July 5, 1990

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1989

VIRGINIA M. SEJMAN; A. R. TRAUTWEIN; THOMAS H. GIVENS; THOMAS J. MCHUGH, JR.; GLENDA IDLE; ROY G. COOK; JOSEPH D. DUBUQUE; C. ROBERT REESE; JOSEPH D. NORMAN; MORRIS LEISTER; MARY J. MILLER; RAYMOND G. BERNHARDT; LEWIS LATHREN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

WARNER-LAMBERT COMPANY, INC.,

Respondent.

THOMAS H. GIVENS; M. L. BRANNON; JOHN J. CAPUTO; C. E. ROBINSON, JR.,

Petitioners,

v.

WARNER-LAMBERT COMPANY, INC.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Sejman v. Warner-Lambert Co., 889 F.2d 1346 (4th Cir. 1989). 3, 2

A. A conflict exists in the circuits as to the interpretation of severance pay contracts upon the sale of a division as a going concern.

While different facts may well yield different results, substantially the same facts should yield substantially the same result. Petitioners agree that the wording of the contract in Harris v. Pullman Standard, Inc., 809 F.2d 1495 (11th Cir. 1987) is not identical to the wording of the severance pay contract in the present case. A reading of the two contracts reveals, however, that they are substantially the same in their wording.[1] An attorney in the Eleventh Circuit reading either the Warner-Lambert or the Pullman severance contract would expect a court to award severance in accordance with the Harris decision. An attorney in the Fourth Circuit reading the Warner-Lambert or the Pullman severance contract

[1] The severance policy in Harris provides for [f]or all involuntary terminations, other than lay-off, a termination allowance will be granted." Id. at 1479. The Warner-Lambert severance policy provides for severance pay for "an employee terminated by the Company, as a result of job elimination, work performance, or other reason of company convenience." Livernois v. Warner-Lambert, Co., 723 F.2d at 1149.

would expect a court to deny severance in accordance with the decision below. No clearer conflict between the circuits could be shown.

B. The Fourth circuit improperly interpreted the provisions of the Employee Retirement Income Security Act.

Realizing that the Fourth Circuit in Livernois v. Warner-Lambert Co., 723 F.2d 1148 (4th Cir. 1983) provided the petitioners with the benefits which they now seek, the respondent has taken the only course available to it and contends that the interpretation of the contract recognized in the Livernois decision was preempted by ERISA.[2] Respondent's dilemma is unavoidable because it is clear that in the decision below the Fourth Circuit re-interpreted the severance contract and gave the petitioners

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[2] Respondent's argument that the Fourth Circuit in Sejman v. Warner-Lambert Co., 845 F.2d 66 (4th Cir. 1988)(Sejman I) overruled Livernois, while a misinterpretation of the Sejman I decision, is not relevant to the analysis of the decision below. Even if the interpretation of the Sejman I decision by the respondent were correct, the decision below still gives petitioners still have fewer benefits under ERISA than they had before.

fewer rights under the contract than they had before ERISA was applied to this case.

The respondent urges that this Court accept the Fourth Circuit's mistaken view in the case below that ERISA imposes upon employers maximum standards and not minimum. The respondent contends that under ERISA severance pay benefits can never be vested rights. They appear to urge this position even if the contract itself would grant vested severance rights. The respondent says that the decision in the case below was proper because "[t]o have held otherwise would have thwarted Congress' intent of exempting employee welfare benefit plans from vesting requirements and from the attendant administrative burden and expense." Brief in Opposition at 10. Congress never intended for ERISA to prohibit the vesting of benefits. In their positions, both the respondent and the Fourth Circuit in the case below misconceive the proper interpretation of ERISA and have applied the wrong standard of review.

CONCLUSION

This case affords this Court the opportunity to resolve a conflict within the circuits and to make clear that under ERISA, employees have at least the same benefits they had prior to ERISA.